No. 72-1628

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In the Supreme Court of the United States

OCTOBER TERM, 1973

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION, PETITIONERS

v.

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC. AND DENA PICTURES, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
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Petitioners, owners and operators of cable television (CATV) systems, seek review of a decision of the court of appeals holding that when a CATV system imports "distant" signals, it "performs" copyrighted material carried on those signals and thereby incurs liability for copyright infringement under the Copyright Act of 1909, as amended, 17 U.S.C. 1.

This decision raises important questions as to the application of the Copyright Act to television signal distribution by CATV systems, particularly in the light of this Court's decision in *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390. In

Fortnightly, this Court held that certain CATV systems distributing broadcast signals did not "perform" copyrighted material within the meaning of the copyright law.

The extent to which CATV systems should incur copyright liability for distributing television signals beyond the usual range of reception for such signals has great practical significance for the CATV industry, television broadcasters, copyright owners, and, ultimately, the viewing public. It will directly affect the development of CATV and thus future competition among electronic media. It also bears directly on the nation's copyright policy. The United States, through its agencies responsible for communications, copyright and competitive policy, is directly concerned with these consequences.

In the long run the question of copyright liability for CATV systems requires a comprehensive balancing of many different competing interests. Efforts toward a legislative resolution of the problem, which would be incorporated into a proposed revision of the Copyright Act, have been under consideration since 1965.[1] But because the process of resolving the conflicting private and public interests is complicated and difficult, it is uncertain when or whether legislation will be forthcoming. In the meantime the several economic interests involved and the public are entitled to know where they stand under existing law, so that the development of CATV and its relation to the broadcasting industry can be accommodated to present requirements. This Court gave important guidance to all concerned when it considered the *Fortnightly* case. It should follow a similar course now.

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[1] The most recent proposal is found in §111 of S. 1361, 93d Congress, a proposed revision of the Copyright Act introduced in the Senate on March 26, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.